

Tilton v. Securities and Exchange Commission
Docket No. 15-2103

Jon O. Newman, *Circuit Judge*, concurring:

An additional reason why the Appellants in this case must raise their Appointments Clause issue by filing a petition for review in a court of appeals rather than initiate a new action in a district court is a concept that has been called "colorable jurisdiction." As the Seventh Circuit has explained in a case challenging an order of criminal contempt, "If a court has colorable jurisdiction of a case, though later it is determined that actually it didn't have jurisdiction, an order of criminal contempt issued by the court before the absence of jurisdiction is determined is valid." *Mann v. Calumet City*, 588 F.3d 949, 954 (7th Cir. 2009).

The Supreme Court, without using the phrase "colorable jurisdiction," made the same point in *United States v. United Mine Workers of America*, 330 U.S. 258 (1947). The Court there ruled that even if the constitutionality of a statute is in doubt, an order issued by a court under that statute must be obeyed and enforced even by criminal contempt. See *id.* at 293. The Court noted that "a different result would follow were the question of jurisdiction frivolous and not substantial," *id.*, or, as Justice Frankfurter's concurrence put it, the "court is

so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities," *id.* at 309 (Frankfurter, J., concurring).

The concept of colorable jurisdiction has also been deemed relevant to the availability of a collateral attack to challenge a judgment for lack of subject matter jurisdiction. Courts have distinguished between an erroneous assertion of subject matter jurisdiction, where collateral attack is precluded by *res judicata*, and a clear usurpation of judicial power, where collateral attack is permitted. See *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (collecting cases); see also Restatement (Second) of Judgments § 12(1) (1982). "Collateral attack is available only if the assertion of subject matter jurisdiction was without colorable basis, not merely erroneous." *In re U.S. Catholic Conference*, 824 F.2d 156, 165 (2d Cir. 1987), *rev'd on other grounds*, *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) (on direct appeal, nonparty witness held in civil contempt may challenge subject matter jurisdiction of court in underlying action).

The Administrative Law Judge ("ALJ") that will be hearing the pending administrative proceeding against the Appellants is not an interloper. The ALJ is an official of the agency,

facially clothed with authority to adjudicate the proceeding before her. Whether her appointment comports with the Appointments Clause is a fair question, but there is surely a plausible basis for arguing that her appointment is valid.

With colorable jurisdiction, the ALJ may adjudicate the administrative case, and the losing party will have its opportunity to seek review before the Commission and then petition for review of a final order in a Court of Appeals, *see* 15 U.S.C. § 80b-13(a).

For this additional reason, I concur in Judge Sack's opinion for the Court.